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IN THE
SUPREME COURT OF THE UNITED STATES

LORILLARD TOBACCO COMPANY, *et al.*,
Petitioners,

-v.-

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE*, CITY OF NEW YORK & PETER F. VALLONE, SPEAKER OF THE CITY COUNCIL, AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

The City of New York and Peter F. Vallone, the Speaker and Majority Leader of the City Council of the City of New York (hereafter "the NYC *amici*"), and the Mayor and City Council of Baltimore ("the Baltimore *amici*"), submit this brief in support of affirmance of the judgment of the United States Court of Appeals for the First Circuit in *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *cert. granted sub nom. Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 755 (2001).[1] Both the NYC and Baltimore *amici* have strong interests in this case.

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[1] Pursuant to Rule 37.6 of this Court, the NYC and Baltimore *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives

The NYC *Amici*

The City of New York and the City Council, whose Speaker and Majority Leader, Peter F. Vallone, has sponsored much of the City's legislation in this area, have taken a lead role in enacting a series of laws intended to protect the City's children from the detrimental effects of illegal sales and distribution of tobacco products.

In fact, New York City has a law quite similar to the one at issue herein, Local Law 3 of 1998, the Youth Protection against Tobacco Advertising and Promotion Act ("the NYC Act").[2] As described more fully below, the NYC Act is designed to promote enforcement of local laws banning the sale or distribution of tobacco products to minors and to protect young people, who are extremely susceptible to outdoor and publicly-visible tobacco product advertisements. Accordingly, the NYC Act places reasonable restrictions on the location of such advertisements aimed at or regularly seen by youth near schools, playgrounds and daycare centers.

A brief review of the background of the NYC Act is useful. For some time, pursuant to New York Penal Law, it has been a misdemeanor in the State of New York to sell or cause to be sold tobacco to a child under the age of eighteen. *See* N.Y. Penal Law, § 260.21(3). In more recent years, the N.Y. City Council has enacted local legislation to control the sale and distribution of tobacco products to minors.

For example, in 1990, concerned that free cigarette samples were regularly distributed and that teenagers often obtained them, the N.Y. City Council prohibited all distribution of free tobacco products for commercial purposes

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made any monetary contribution to the preparation or submission of this brief.

[2] *See* N.Y.C. Admin. Code, § 27-508.1 *et seq.*.

in public places, except at those places, such as stores, which are "point of sale" locations. N.Y.C. Admin. Code, § 17-176. Also prohibited are the distribution of tobacco products from vending machines in all public places, except taverns, because such machines had provided unsupervised minors easy access to cigarettes. *Id.*, § 17-177.

In a further effort to limit the availability of tobacco products to minors, the 1992 Tobacco Product Regulation Act requires retail sellers of tobacco products to be at least 18 years of age or under the supervision of someone at least 18 years old. *Id.*, § 17-619. Such retail sellers must obtain photographic proof-of-age from all purchasers, unless they reasonably appear to be at least 25 years of age, and to post certain warning signs on the prohibitions on sale of tobacco products to minors. *Id.*, § 17-620.

Notwithstanding these laws, retail stores remained substantially non-compliant despite repeated enforcement and educational efforts. These included undercover investigations and sweeps utilizing student volunteers, numerous press releases, over 1000 inspections, issuance of hundreds of citation violations and letters to licensed retailers, and license suspensions.

Thus, on December 17, 1997, the N.Y. City Council passed the NYC Act, which restricts, *inter alia*, outdoor tobacco product advertisements (other than those on moving vehicles) within 1000 feet of various locations where children congregate, *i.e.*, any school building, playground, child day care center, amusement arcade or youth center.[3]

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[3] The NYC Act also concerns other matters, including provisions concerning certain promotional practices of cigarette companies, which provisions were never challenged. Accordingly, all references to the NYC Act refer only to those portions restricting the location of outdoor and publicly-visible cigarette advertising.

In addition to the parallel 1000-foot protected zones, both Massachusetts and New York City limit some indoor point-of-sale cigarette advertising in retail stores in those zones, when such advertisements are publicly-visible from the street. The NYC Act permits cigarette advertisements to be placed anywhere in retail stores as long as the advertisements are either (i) parallel to the street and facing inward, or (ii) affixed to a wall panel or similar structure that is perpendicular to the street or are more than five feet from the store's door or window. However, Massachusetts is more restrictive, prohibiting placement of such advertisements anywhere in the store, facing outward or visible from outside or at a height lower than five feet from the floor.[4]

In the comprehensive "Declaration of legislative findings and intent," comprising section 1 of the Act, the N.Y. City Council cited evidence that certain tobacco product manufacturers have admitted engaging in "strategies designed to advertise and promote tobacco products to minors" and found that "such strategies undermine state and local laws prohibiting the sale or distribution of tobacco products to minors."

Of great concern to the N.Y. City Council, ample data established a dramatic increase in teenage smoking, with statistics gathered by the federal Centers for Disease Control and Prevention ("CDC") demonstrating that, although the rate of smoking among adults decreased by 50% between 1971 and 1993, the rate of smoking among all high school students increased by over 26% from 1991 to 1996. The Council emphasized that studies demonstrate that "nearly 90% of all smokers begin to smoke prior to the age of 18 and that the average child smoker starts daily smoking by the age of 14."

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[4] Apparently, Massachusetts was concerned about the phenomenon, which New York City has also noted, *i.e.*, cigarette advertisements are regularly placed at the level of a child's eyes.

In New York City, as reported by the Department of Consumer Affairs, 200 children began to smoke every day.

This dramatic increase in teenage smoking occurred even while all the states have had prohibitions in effect on the sale or distribution of cigarettes and other tobacco products to minors and despite a voluntary industry code to prohibit tobacco advertisements that appeal to minors. Indeed, this Court recently recognized that "...tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

The N.Y. City Council relied on substantial evidence of the major role played by tobacco advertising and promotion in tobacco use by minors, including various studies from the Journal of the American Medical Association, reports of the National Institute of Medicine and the CDC finding that advertising and promotion "...increase tobacco use by youths...." There was also ample testimony and other reports from experts, newspaper and scientific journal articles, and other written submissions, which provided compelling data that advertising of tobacco products has played a significant role in teenage tobacco use and smoking patterns and that there is a pervasive presence of tobacco advertising, obviously targeting youth, in the community.

Perhaps most tellingly, even professionals in the advertising business agreed that the goal of advertising is to target teenagers. For example, in one statement by a tobacco product manufacturer, "Liggett acknowledge[d] that the tobacco industry markets to 'youth,' which means those under 18 years of age...." Furthermore, in one survey of 300 advertising executives, 68% stated that the "tobacco industry has as a goal for its advertising marketing cigarettes to teenagers who already smoke," 59% stated that "marketing to non-smoking teenagers is a goal," and 71% stated that

advertising makes smoking more appealing to children. Such statements were confirmed by other revelations in tobacco company documents discussing strategies to target youth in cigarette advertisements.[5]

Accordingly, the City of New York was and remains very concerned about the pervasive presence of tobacco advertising, obviously targeting youth in the community, particularly near schools. Based upon all the above evidence and the concern of local public officials to decrease young people's temptation to become engaged in unlawful conduct and to better secure youth's safety and welfare, the N.Y. City Council determined to enact constitutionally permissible restricts on tobacco product advertising and promotion.

Following a challenge by local retailers, on October 25, 1999, the U.S. Court of Appeals for the Second Circuit held that, with one small exception, the N.Y.C. Act was not pre-empted under the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1331 *et seq.*.[6] It

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[5] The N.Y. City Council's findings also cited much of the evidence contained in the 1996 Food and Drug Administration ("FDA") proposed rules on advertising and promotion of tobacco, including evidence that such advertising particularly targeted youth, and often specifically minority youth, and that these campaigns have been successful. This Court subsequently found that the FDA lacked administrative authority to act in this area and issue such rules. *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

[6] The exception pertained to "tombstone" provisions, which Massachusetts also had, pursuant to which retail stores could post "tombstone" signs notifying the public that tobacco products/cigarettes were sold at the premises. However, those provisions were challenged and then struck down on pre-emption grounds by, respectively, the District Court for the District of Massachusetts (in a portion of its ruling which was not appealed) and by the Second Circuit. Accordingly, such provisions are not

remanded the case for further proceedings on the First Amendment issue. *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000) ("*Greater N.Y.*").[7]

The Baltimore *Amici*

The Mayor and the City Council of Baltimore ("Baltimore") have a strong interest in the present case, which may have a direct effect on the laws presently in force in Baltimore.

Since 1992, it has been illegal in the State of Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md. Ann. Code, Art. 27, Sec. 404 (1992). Effective October 1, 1994, Maryland also prohibited minors from using or possessing "any tobacco product." Md. Ann. Code, Art. 27, Secs. 404 and 405A (Supp. 1994). A few months earlier, Baltimore, in a further effort to reduce the illegal consumption of cigarettes by minors, had enacted Ordinance 307 prohibiting the placement of any sign that "advertises cigarettes in a publicly visible location, i.e. on "outdoor billboards, sides of building[s], and free standing signboards."[8]

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before this Court and were no longer at issue when the First Circuit issued its decision.

[7] Following further briefing, upon learning that a petition for certiorari had been filed in this case, in August 2000, the U.S. District Court for the Southern District of New York (Batts, D.J.) placed the case on the suspense calendar pending resolution by this Court.

[8] The principal provision of Ordinance 307 provides:

Cigarette advertisements. No person may place any sign, poster, Placard, device, graphic display, or other form of advertising that

The prohibition contained in Ordinance 307 paralleled the scope and language of Baltimore City Ordinance 288, also enacted in 1994, which regulated the advertising of alcoholic beverages. The exceptions to the prohibition in Ordinance 307 mirrored the exceptions in Ordinance 288 and permitted such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contained an exception permitting advertising in certain commercially and industrially-zoned areas of Baltimore.

Before enacting Ordinance 307, the Baltimore City Council received testimony and studies which detailed the correlation between cigarette advertising and the consumption of cigarettes by minors. As expressed in the preamble to the ordinance, the Baltimore City Council found that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It also noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear to 'open the door' for use of other harder drugs at a later date." To reduce the illegal consumption of cigarettes by minors, the Baltimore City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements.

On the day that Ordinance 307 went into effect, Penn Advertising of Baltimore, Inc., filed an action in federal court

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advertises cigarettes in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30, §10.0-1(1). The ordinance, by its own terms, became effective on April 6, 1994.

to enjoin the enforcement of the ordinance and to obtain a declaratory judgment that (1) the ordinance was preempted by §5(b) of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1334(b), and by the Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violated the First and Fourteenth Amendments of the U.S. Constitution. The District Court granted summary judgment in favor of Baltimore.

In its subsequent appeal to the U.S. Court of Appeals for the Fourth Circuit, Penn Advertising claimed that Ordinance 307 was void because Baltimore's authority to enact such a law was preempted by §5(b) of the FCLAA which mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§1331-1340. It also argued that, because the ordinance's prohibition was based on health concerns, it was preempted by the federal statute, relying exclusively on the analysis of §5(b) by this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Applying the *Cipollone* analysis to Ordinance 307, the Fourth Circuit held that the FCLAA did not preempt the ordinance because the ordinance limits only the *location* of signs that advertise cigarettes but not their *content* and "[t]he ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*." *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995) (emphasis in original).

The Fourth Circuit also considered Penn Advertising's contention the Ordinance 307 was an impermissible regulation of commercial speech under the four-prong test in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). The principal dispute centered on the third and fourth prongs that questioned whether the

enactment directly advanced the government's stated public interest and whether the enactment was more extensive than necessary to serve that interest. Finding that a logical nexus existed between Baltimore's objective and the means selected for achieving the objective and that the advertising regulation was narrowly tailored to meet the fourth prong, the Fourth Circuit affirmed the judgment of the District Court. *Penn Advertising*, 63 F.3d at 1325-26.

In granting Penn Advertising's petition for writ of certiorari, this Court vacated the judgment and remanded the case to the Fourth Circuit for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). *Penn Advertising of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030 (1996). Upon remand, the Fourth Circuit reaffirmed its prior decision and this Court subsequently denied certiorari. *Id.*, 520 U.S. 1204 (1997).

Baltimore's Ordinance 307 and the Massachusetts regulation at issue in the instant case are similar in that they both limit the advertising of tobacco products and were challenged as being pre-empted by the FCLAA and violating First Amendment rights. As a result of the rulings in *Penn Advertising*, Baltimore has been able to continue to enforce its restrictions on tobacco advertising and to protect minors from the effects resulting from such advertising. Baltimore now has a strong interest in seeing that the Massachusetts law is upheld and thus urges this Court to affirm the decision of the U.S. Court of Appeals for the First Circuit.

SUMMARY OF ARGUMENT

Pursuant to this Court's guiding pre-emption and First Amendment principles, laws such as those of Massachusetts, New York City and Baltimore, are constitutional because they were enacted to further the substantial interests in preventing unlawful sales of tobacco products to minors and in protecting the welfare of children and are narrowly tailored to that effect.

Given that the laws do not proscribe or prescribe any content in tobacco product advertisements, a finding that they are not pre-empted by federal law comports with the FCLAA and this Court's guiding tenets of pre-emption analysis, including those set forth in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (plurality). In fact, although unacknowledged by petitioners, the First Circuit's decision is in ample agreement with the vast majority of Circuit Courts, the Second, Fourth and Seventh, that local laws which merely restrict the location of outdoor and publicly-visible tobacco product advertising are proper exercises of historic state and local police powers and are therefore not pre-empted. So too, the United States has taken that position repeatedly in supporting *amici* briefs in these cases.

Furthermore, such laws do not violate the First Amendment. Petitioners' pleas for this Court to change the standard of review with respect to pure commercial speech should be rejected. This is particularly so in the instant case, given the substantial need to protect children from the aggressive advertising and sales practices targeting youth. Using the traditional four-part test enunciated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), these laws are proper because, *inter alia*, they are appropriately narrowly tailored and do not ban the display of tobacco advertising, but rather restrict it to outdoor locations or those easily visible from outdoors, near a number of carefully-defined locations where children are likely to congregate.

ARGUMENT

STATE AND LOCAL LAWS SUCH AS THE ONE AT ISSUE HERE, WHICH RESTRICT THE LOCATION OF OUTDOOR AND PUBLICLY-VISIBLE TOBACCO ADVERTISEMENTS AWAY FROM AREAS WHERE MINOR CHILDREN CONGREGATE, ARE A PROPER EXERCISE OF HISTORIC POLICE POWERS. SUCH LAWS ARE NOT PRE-EMPTED UNDER THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT AND DO NOT VIOLATE THE FIRST AMENDMENT.

(1)

Based on well-settled principles, state and local laws such as those of Massachusetts, the City of New York and Baltimore are proper exercises of their historic police powers to provide for compliance with their laws and the general welfare of their children that are not pre-empted by the FCLAA.

While the starting point of pre-emption analysis must begin with the text, that interpretation is informed by two presumptions. First, because the States are independent sovereigns, where the exercise of historic state or local police powers is involved, it is presumed that such police powers are not to be superseded "unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality) ("*Medtronic*"); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (plurality opin.) ("*Cipollone*"). That approach is consistent with both federalism concerns and the historic

primacy of state police power regulations. *Medtronic*, 518 U.S. at 485; *California Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316 (1997).

Second, the analysis of the scope of a pre-emption provision is guided by the fact that "the purpose of Congress is the ultimate touchstone" in every case. *Medtronic*, 518 U.S. at 485, citing, *inter alia*, *Cipollone*. Such review includes not only the text but also a review of the statutory framework and the court's reasonable understanding of the way Congress intended the statutory scheme to affect businesses, consumers, and state and local governments. *Medtronic*, 518 U.S. at 485. *See also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Tellingly, petitioners ignore the important principles in *Medtronic*.

In starting the analysis with the language used by Congress, the FCLAA identifies the congressional purpose in 15 U.S.C. § 1331:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling

and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

In keeping with this purpose, the FCLAA requires, *inter alia*, that every package of cigarettes sold or distributed and any advertising of cigarettes in the United States bear, in conspicuous form, one of four prescribed Surgeon General's warnings. 15 U.S.C. § 1333.

The FCLAA then sets forth an explicit pre-emption provision, 15 U.S.C. § 1334(b), as follows: "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this chapter."

Accordingly, neither the express language of the FCLAA nor its reasonable interpretation pre-empts these laws in light of the Congressional purpose in enacting the FCLAA, to prevent the burden imposed by "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2). Congress sought to avoid the imposition of multiple regulatory schemes on cigarette companies that would require different labels and advertisements in each of the fifty states. *Cipollone*, 505 U.S. at 513-15, 529 (state law prohibitions on false statements not pre-empted because they do not create "diverse, nonuniform and confusing standards"). Thus, the focus was on prohibiting state regulation of the content of required warnings on cigarette packages or of cigarette advertisements.

Furthermore, in *Cipollone*, this Court cited with approval the accompanying Senate Report to the FCLAA. *Id.*, 505 U.S. at 529, n.26. Therein, the legislative history of § 1334(b) "suggests that Congress wanted to give ... [police power] regulations a wide berth," given that the Senate Report

notes that §1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations" (*Greater N.Y.*, 195 F.3d 110, *citing* S. Rep. No. 91-566, reprinted in 1970 U.S.C.C.A.N. 2652, at 2663).

Here, the laws at issue do not require a particular message concerning smoking and health to be included in advertising and do not affect the content of the advertising in any way. Nor do they burden interstate commerce or the national economy. Rather, the laws primarily regulate the location of outdoor billboard advertising.

Under longstanding precedent, that is a matter of traditional state and local concern and police powers, not a national concern. Clearly, this zoning type restriction places no burdens on interstate commerce, nor does it impose upon the tobacco companies and their advertisers any requirement that they provide a different advertisement than they provide elsewhere. The restrictions are peculiarly within the sphere of local police powers, a domain which Congress specifically sought to preserve for state and local regulation. Under this Court's precedent, it thus falls outside Congress' Commerce Clause authority and therefore may not be found pre-empted by the FCLAA.

Such laws also accord with localities' well-established interest in the welfare of their children. Indeed, the strong local interest in the general welfare of minors is long-standing and the origins of state and local regulation in New York barring sales of tobacco products to minors date back to at least 1889. *See* Laws of New York, 1889, Chapter 170.

In *Packer Corp. v. Utah*, 285 U.S. 105 (1932) (Brandeis, J.), this Court upheld a corporation's conviction of violating Utah's ban on outdoor tobacco advertising on billboards finding

that such local regulation was "wholly intrastate." *Id.* at 110.[9] More recently, this Court has affirmed the principle that the Commerce Clause authority is limited and that it is not "fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," declining to expand some of its prior precedent which had taken "long steps down that road." *United States v. Lopez*, 514 U.S. 549, 567 (1995).

Cf. Printz v. United States, 521 U.S. 898, 935 (1997) (in holding unconstitutional Brady Act interim provision requiring local chief law enforcement officers to conduct background checks on proposed handgun transferees, Court found "such commands . . . fundamentally incompatible with our constitutional system of dual sovereignty"); *United States v. Locke*, 529 U.S. 89 (2000) (reiterating that an "assumption" of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence, and contrasting that situation to cases involving subjects historically regulated by the States).

Given that a court should avoid, when fairly possible, an interpretation that would either render a statute clearly unconstitutional or even raise serious doubts, this Court should construe the FCLAA to pre-empt only state/municipal regulations of cigarette labels or advertising content. *See, e.g., Edmond v. United States*, 520 U.S. 651, 658 (1997).

Moreover, although virtually unacknowledged by petitioners and their *amici*, the First Circuit's decision is in ample agreement with the vast majority of Circuits, the Second, Fourth and Seventh, that such local laws are proper exercises of long-standing police powers and are not pre-empted under the FCLAA. *See Greater N.Y., supra*;

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[9] As set forth by the Massachusetts Attorney General, the Utah provision, Utah Code 76-10-102 (1995 Replacement) is in effect today (Resp. Br. in Opp. to Certiorari, p. 4).

Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 189 F.3d 633 (7th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000); *Penn Advertising of Baltimore v. Mayor*, 63 F.3d 1318 (4th Cir. 1995), *vac. and remanded*, 517 U.S. 1204 (1996), *aff'd*, 101 F.3d 322 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).[10]

As these Courts have held, the location restrictions at issue do not impose obligations "with respect to" advertising as that phrase is used in §1334(b) and do not touch upon Congress's "comprehensive Federal program" to control cigarette advertising warnings and information. Furthermore, the restrictions do not burden advertisers with a duty to warn nor impose content and format requirements on advertising information, but, instead, regulate placement of signs in a "manner akin to a run of the mill zoning regulation." *Greater N.Y.*, 195 F.3d at 109.

Any argument that such location restrictions lead to the sort of "diverse, nonuniform, and confusing" standards that Congress sought to avoid when it enacted §1334(b) fails. Rather, as the Second Circuit stated:

> Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without [local regulation], a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We

[10] The only Court to disagree is the Ninth Circuit in *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir. 1999), *amended*, 203 F.3d 1150 (9th Cir. 2000).

> see no reason to treat the location restrictions before us any differently.

(*Greater N.Y.*, 195 F.3d at 109, italics in original).

In sum, the presumption against pre-emption is particularly strong in the instant case, as the challenged provisions both as to placement of outdoor advertising and as to regulations directed to the safety and welfare of children lay "within the heartland of the states' historic police powers" (*Greater N.Y.*, 195 F.3d at 109, citations omitted).

Finally, in this case, as well as in the Second and Seventh Circuit cases, the United States filed briefs contending that the state and local laws governing the location of such advertising are not pre-empted by the FCLAA. This position, reflecting expertise by the Department of Justice, the agency charged with enforcement of the FCLAA and concerned about its proper application, 15 U.S.C. § 1339, recognizes that Congress meant to preserve the types of police regulatory powers traditionally exercised by the states and localities.[11]

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[11] The Master Settlement Agreement ("MSA") between the country's largest tobacco companies and numerous states settling financial claims by the states, was entered after New York City's and Baltimore's laws, but before the Massachusetts law. The MSA is designed primarily to compensate states for the health-care costs incurred as a result of tobacco use, although it does include some restrictions on advertising. However, among other limitations, it: 1) includes as private signatories, only certain tobacco manufacturers, not the thousands of other entities involved in the distribution, promotion and sale of tobacco products; 2) does not comprehensively address forms and aspects of advertising that are particularly effective in enticing children to begin tobacco use; and 3) does not contain enforcement mechanisms beyond actions by individual states to enforce the Agreement.

(2)

Despite petitioners' and their *amici*'s urgings, this Court should not employ a "strict scrutiny" test for the purely commercial speech at issue here. Petitioners advocate this radical departure from precedent based on their allegations that the laws are impermissibly content-based and, separately, that they essentially impose a ban on this type of lawful commercial speech. Not only are these characterizations misleading, but also, while this Court has employed "special care" in reviewing regulations which impose blanket bans on commercial speech, it has not departed from the intermediate level of scrutiny appropriate for reviewing restrictions on commercial speech. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 (1996).

Tobacco product advertising is quintessential commercial speech. Such advertisements do "'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citation omitted). Although protected under the First Amendment, such speech is given less extensive protection than non-commercial speech, involving political or social issues of public concern. It is given only "a limited measure of [such] protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) ("*Edge Broadcasting*").

Based on these considerations, this Court's 4-prong test for determining the lawfulness of governmental regulation of commercial speech in *Central Hudson Gas & Electric*

Furthermore, it sets minimum standards and there is nothing in the MSA that precludes state and local governments from enacting statutes or local laws that are stricter or more comprehensive as to injunctive relief, including as to advertising.

Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) has been repeatedly followed. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 184 (1999) (applying *Central Hudson* to regulations restricting advertisements for casino gambling); *Edge Broadcasting* (subject-matter based federal statute which barred the broadcast of lottery advertisements for the Virginia lottery by a radio station licensed in North Carolina, a non-lottery state, did not violate the First Amendment); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (upholding Florida Bar rule prohibiting personal injury lawyers from sending targeted mail solicitations for 30 days following an accident, reaffirming: "Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values....").

The imposition of a strict scrutiny test is particularly inappropriate in this case, where the government has enacted a targeted restriction on commercial speech aimed at children, while leaving ample room for advertising for adults.

In particular, the regulations restrict tobacco advertising directed to children, who cannot legally purchase tobacco products. Indeed, even petitioners admit that "the government has greater power to regulate the content of commercial speech when it "regulates commercial messages to protect consumers from misleading, deceptive, or *aggressive sales practices*, or requires the disclosure of beneficial consumer information." *44 Liquormart*, 517 U.S. at 501, cited in Pet. Br. at 29 (emphasis added).

Thus, in contrast to *44 Liquormart, supra*, where Rhode Island desired to enforce adult temperance through an artificial constraint, New York City's and Baltimore's interests, as Massachusetts', include protecting children who are not yet independently able to assess the value of the message presented and who have been targeted by aggressive marketing. This conforms to this Court's repeated recognition

that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (upholding the FCC's power to regulate indecent speech over the radio, in part because of greater restrictions when the state's interest in protecting children is involved); *Ginsberg v. New York*, 390 U.S. 629 (1968). *See also Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

For all these reasons, therefore, strict scrutiny is inappropriate in the instant case.

(3)

Pursuant to the 4-prong *Central Hudson* test, local laws such as the one at issue here do not violate the First Amendment, as the First Circuit held in this case and as the Fourth Circuit held in *Penn Advertising*, *supra*, and *Anheuser-Busch*, *supra*.

Here, moving beyond the first and second prongs which are a given, *i.e.*, the advertisements are lawful and the governmental interests are substantial, the third prong of the *Central Hudson* test has also been met because there is substantial evidence that tobacco advertising has been effective in increasing demand among children. In brief, there was substantial evidence before the State of Massachusetts, as there was before the New York and Baltimore City Councils, that there is a proliferation of tobacco product advertising in areas around schools, playgrounds, and other places where children gather, and significant evidence of tobacco manufacturers' targeting of youth in advertising strategies.

Advertising works. Courts have long recognized this self-evident conclusion. In *Central Hudson*, this Court noted: "There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the

advertising ban unless it believed that promotion would increase sales." *44 Liquormart*, 517 U.S at 500 (quoting same). *See Edge Broadcasting*, 509 U.S. at 434 (noting the restrictive legislation at issue was based upon a premise that "advertising ... serves to increase the demand for the advertised product"); *see also Packer*, 285 U.S. at 110 (stressing that outdoor tobacco product advertising, particularly when aimed at "young people," cannot be turned off); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (drawing distinction between a recipient of mailings, (who can toss them out without opening them, and a pedestrian confronted by large billboards, which obviously cannot be turned off).

The laws at issue here pertain to uniquely pervasive media, outdoor billboard and publicly-visible signs, and do not bar tobacco product advertising, but rather merely seek to restrict advertisements to locations where children are less likely to see them.

Accordingly, this case is unlike *Sable Communications of California v. FCC*, 492 U.S. 115 (1989), where a "dial-a-porn" service successfully challenged a regulation imposing a blanket ban on indecent telephone messages, with this Court finding that there were more narrowly-tailored ways to restrict the ability of children to hear such messages. However, this Court carefully distinguished and reaffirmed its holding in *FCC v. Pacifica Foundation*, *supra*, because the restriction did not involve a total ban and the medium was "uniquely pervasive." *Id.* at 127-28.

So too, this case is unlike *Reno v. ACLU*, 521 U.S. 844 (1997), where a majority of this Court found that, unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the Act at issue was not limited to commercial speech or commercial entities, but rather, its open-ended prohibitions embraced all non-profit entities and individuals posting

indecent messages or displaying them on their own computers in the presence of minors. *Id.* at 877. Similarly, *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), concerned a blanket ban on certain expressive speech, which is unlike the instant case.

The fourth prong of the *Central Hudson* test, which requires a determination that the restriction is no more extensive than necessary to serve the governmental interest, was also met. In *Board of Trustees v. Fox*, this Court held that the test is something short of a "least-restrictive-means standard" and that what is required is a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, leaving to governmental decisionmakers the judgment what manner of regulation may best be employed. *Id.*, 492 U.S. at 480. *See Edge Broadcasting*, 509 U.S. at 429-30.

On the record in Massachusetts, as before the N.Y. City Council and the Baltimore City Council, the evidence demonstrated that, although increased enforcement was helpful in decreasing illegal sales of tobacco products, it did not solve the problem. There was ample evidence to support the findings that tobacco advertising is pervasive in areas where children congregate and that such advertising has a detrimental effect on children, influencing them to smoke and thus to acquire tobacco products despite the ban on sales of such products to them. As the First Circuit held and other Circuits have recognized, failure to exhaust all alternative means of enforcing laws against underage sales does not prohibit the imposition of tobacco advertising restrictions. As was the case with New York City and Baltimore, Massachusetts did not "[choose] speech restrictions as its first or only punch in its fight against underage tobacco use." *Consolidated*, 218 F.3d at 51.

Finally, contrary to petitioners' claims, such laws do not limit the ability of adults to read or see any

communication. They simply limit the exposure of young people in publicly accessible forums, which they and their parents cannot control.

Indeed, the number of tobacco advertisements displayed inside the premises of a business which sells tobacco products is not limited, nor is the content of such advertisements. Instead, the Massachusetts and New York City laws simply restrict the location of such advertisements within the stores. The placement of billboards is not banned, but rather restricted to locations where children are less likely to gather.

In addition to the fact that there are significant areas available away from targeted locations where children gather, there are a host of other fora available for tobacco advertising, which are not barred or restricted. In New York City, for example, it can be displayed on all moving vehicles, such as in and on taxicabs, trucks, and delivery bicycles, as well as in magazines, newspapers, and the Internet. *See, Consolidated Cigar*, 218 F.3d at 51-52; *Penn Advertising of Baltimore, Inc. v. Mayor*, 862 F. Supp. 1402, 1414 (D. Md. 1994), *aff'd*, 63 F.3d at 1324; Correia, E.O., *State and Local Regulation of Cigarette Advertising*, 23 Notre Dame Jour. of Legislation 1, 7 (1997).

Accordingly, for all the above reasons, we respectfully urge this Court to affirm the judgment below, recognizing that, in this instance, the historic exercise of state and local police powers, was proper.

CONCLUSION

FOR ALL THE ABOVE REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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